No. 3894

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLAMETTE NAVIGATION COMPANY
(a corporation),

Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLANT.

IRA S. LILLICK,
Proctor for Appellant.

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On the 20th day of May, 1912, the respondent (appellee), Hartford Fire Insurance Company, in consideration of a $1500 premium insured under its open policy the libelant (appellant), Willamette Navigation Company, for the account of itself, loss if any payable to assured, to the amount of $20,000. The policy, a copy of which is attached to the libel (Apostles page 9), covered paper in rolls and/or bundles and/or packages, and/or merchandise and/or supplies, while on board the steamer *"Ruth"* and/or *"N. R. Lange"*, at and from Oregon City, Oregon, to ports and places in the Willamette and/or Columbia rivers and tributaries, and from

Portland, Oregon, and ports and places in the Willamette and/or Columbia rivers and tributaries, to Oregon City, Oregon, direct or via ports and places.

The risks assumed by the respondent Insurance Company were the usual risks in a marine policy, including the perils of the rivers, excepting losses arising from want of ordinary care in handling the cargo or in navigation of the vessel, and the policy also contained the usual sue and labor clause. It was warranted free from particular average but included salvage and general average charges.

The terms of the policy further provided that in case of loss, such loss would be paid thirty days after proof of loss and proof of interest in the lost property was furnished to the respondent Insurance Company; that the Insurance Company, its agent or representative, at or nearest the first port of discharge, should have prompt notice of the loss and should have every opportunity and facility for ascertaining the cause, extent and amount of damage by personal inspection, appraisal or a sale of the damaged property; that no suit or action against the Insurance Company for the recovery of any claim for loss or damage upon, under or by virtue of the policy should be sustained in any court of law or equity unless such suit or action should be commenced within the term of twenty-four months next after the loss or damage had occurred.

The policy further provided that:

> "Immediate notice of the occurrence of all losses shall be given to this company by the

> insured; and within thirty days from the time the same may happen, the said insured shall deliver to said company as particular an account thereof as the nature of the case will admit, stating the causes if known, the extent thereof, and the nature of the interest of insured in the property; also what other insurance or insurances (if any) there were on said property at the time of said loss, which statement shall be in writing, signed by the insured and verified by his or their oath; and so much of said statement as relates to the cause, nature and extent of said loss or damage shall be verified also by the oath of the master of said boat or vessel, or some other person or persons having immediate charge thereof at the time the same did happen; otherwise this company will not be liable under this policy."

On the 11th day of January, 1913, and within the term of the policy, the steamer *"Ruth"*, belonging to the libelant, received on board certain paper in rolls belonging to Willamette Pulp & Paper Company and the Crown Columbia Paper Company at the port of Oregon City, Oregon. On that day the steamer set out on its voyage from the said port to the port of Portland, Oregon, and during the course of the voyage the steamer was stranded and sunk in the Willamette River near the port of Gladstone, Oregon. By reason of the stranding and sinking a part of the paper was damaged and salvage charges were incurred on the paper which was not damaged.

This action is brought against the respondent on the policy by the libelant herein for the value of the damaged rolls of paper belonging to the Willamette

Pulp & Paper Company, the respondent having paid libelant in full for the damaged rolls of paper belonging to the Crown Columbia Paper Company.

Argument.

I.

THE LIBELANT CARRIER HAD AN INSURABLE INTEREST.

It is true that the libelant did not own the paper shipped on the steamer *"Ruth",* but the policy was not limited to cover only such goods as were owned by the assured. The libel alleges and the testimony shows that the paper was placed in the custody and care of libelant. The policy reads that,

> "Hartford Fire Insurance Co., Hartford, Connecticut, by this policy of insurance, in consideration of $1500, does insure Willamette Navigation Co., a corporation, for the account of themselves, loss if any payable to assured to the amount of $20,000, on paper in rolls and/or bundles and/or packages and/or merchandise and/or supplies, while on board steamer *'Ruth'* and/or *'N. R. Lang'.*"

The paper then was delivered to the libelant as a carrier. Its interest in the paper was as bailee for hire and as such it had an insurable interest in its own name and for full value.

The Sidney, 23 Fed. 88;

Phoenix Insurance Co. v. Hamilton, 14 Wall. 504; 20 Law Ed. 729;

Phoenix Insurance Co. v. Erie & Western Transportation Co., 117 U. S. 312; 29 Law Ed. 873;

California Insurance Co. v. Union Compress Co., 133 U. S. 387; 33 Law Ed. 730;
Munich Assurance Co. v. Dodwell & Co. (9th Circuit), 128 Fed. 410.

In several of the cases above cited, it appears that the policy was for the "benefit of the owners" or "whom it may concern"; also that the property insured included that held by the assured as trustee, or in which he might have an interest. We are not concerned with a discussion of these matters here, however, as the policy in the present case clearly states for whose benefit the insurance was effected; that is, the libelant herein. There can be no question as to what property it covers for it states specifically that it is paper in rolls, etc. on board the Steamer *"Ruth"*. If it had been intended to cover only the interest of the libelant in the paper as owner or for judgments obtained against it by shippers, the policy would have so provided.

The respondent admitted in the lower court that the libelant had an insurable interest in the cargo of paper on board the Steamer "Ruth", but it takes the position that libelant cannot recover the value of the paper unless the policy is also expressly for the benefit of the cargo owners; that because the policy does not so provide in the present case, therefore, the libelant carrier cannot collect on the insurance policy unless it can show that it suffered actual damage. In other words, that the carrier is not entitled to collect on the policy of insurance

covering it as bailee unless it proves that the cargo owners have recovered judgment against the carrier for the loss of the goods. But on the other hand, if the cargo owners do recover against the carrier because of bad stowage or other negligence, then the Insurance Company would not be liable to the carrier, because a loss due to the carrier's negligence is an excepted peril under the policy. So by no possibility could an Insurance Company ever be liable to a carrier on a cargo which it held as bailee. Insurance is a gamble, in one sense, but it has been established so long in the business world that it should be conducted honestly and fairly like other business. It should not have as its foundation the principle of "Heads I win, tails you lose." The annual premium of fifteen hundred dollars ($1500) which the respondent charged the libelant for this policy in no way indicates that the respondent did not consider that there might be some liability under the policy. The extraordinary position which it now takes certainly finds no support in good business morals, and probably not in law, as respondent did not cite a single case to support its contention in the lower court.

In the case of the *California Insurance Co. v. Union Compress Company,* 133 U. S. 387, 33 L. Ed. 730, above cited, the policy covered cotton held by the Compress Company on commission and in trust. In other words, the Compress Company was insured as bailee just as libelants are insured in the present case. The defendant Insurance Company claimed

that only the owners of the cotton were entitled to sue on the policy. In upholding the right of the bailee, the Compress Company, to recover on the policy, the court said on page 736:

> "The railroad companies had an insurable interest in the cotton, and to that extent were the owners of the cotton, which was held in trust for them by the plaintiff. Evidence of their ownership of the cotton was admissible. Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527, 542 (23: 868, 869).
>
> The policy covered all the cotton which was placed in the hands of the plaintiff by those companies. It was lawful for the plaintiff to insure in its own name goods held in trust by it, and it can recover for their entire value, holding the excess over its own interest in them for the benefit of those who have intrusted the goods to it. DeForest v. Fulton Fire Ins. Co. 1 Hall 94; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 543 (23: 868, 869); Stillwell v. Staples, 19 N. Y. 401; Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606; Waters v. Monarch F. & L. Assur. Co., 5 El. & Bl. 870; Siter v. Morris, 13 Pa. 218; Johnson v. Campbell, 120 Mass. 449; Fire Ins. Asso. v. Merchants & Miners Transp. Co., 66 Md. 339; London & N. W. R. Co. v. Glyn, 1 El. & Bl. 652; Phoenix Ins. Co. v. Hamilton, 81 U. S. 14 Wall, 504, 508 (20: 729, 731)."

As to the contention of the Insurance Company that this liability was contingent upon the liability of the Railroad Companies to the shippers, the court says on page 740:

> "(7) The court was requested by the defendant to instruct the jury as follows: 'As this action is brought solely on behalf of the

railroad companies on account of liability incurred through carelessness of the agents and servants of the companies, no cause of action accrued against the defendant until the actual payment by said companies of damage on account of the alleged fire, and the recovery cannot be greater than the value, on November 14, 1887, at Little Rock, of the cotton so burned and paid for—nor greater than the sum paid by the railroad companies—that is, if they have paid more than the value of the cotton they cannot recover the excess from the defendant; if they have paid less than the value, they can recover only to the extent of the payment.' The court refused to give that instruction and defendant excepted. This is alleged as error. It is urged that the Memphis & Little Rock Railroad Company has never paid any damages, and that the Missouri Pacific Railroad Company had not paid any when this suit was commenced; and it is contended that no cause of action accrues, in a case of that kind until payment of the damages by the railroad companies is made.

But, as a bailee, under a policy taken out to cover property his own or held by him in trust or on commission, may enforce the contract of insurance to the full value of the property destroyed, holding the proceeds primarily for his own benefit and the balance for that of his bailor, the right of action of the plaintiff accrued on the occurring of the loss. The case cited by the defendant, Cincinnati, H. & D. R. Co. v. Spratt, 2 Duvall, 4, does not apply to the present case. * * * But here the plaintiff is the assured. The insurance included the protection of the railroad companies. The premium was paid. The insured property was destroyed by fire. The condition of the liability of the insurer was complete, and its liability had fully accrued. The only question for li-

> tigation was whether the railroad companies were protected by the insurance. The defendant is called upon to perform only its agreement to pay the insurance money in case of the destruction of the cotton by fire. Its liability is not dependent upon the question whether the liability of the railroad companies has been discharged; nor is the plaintiff's right of action contingent upon the payment by the railroad companies of the value of the cotton burned, but it is contingent only upon the destruction of the cotton by fire under circumstances which impose a liability upon the railroad companies."

In *Munich Assurance Company v. Dodwell,* 128 Fed. 410, above cited, the policy insured Dodwell & Company

> "as well in his or their own names, as in the name and names of all and every other person or persons to whom the subject matter of the policy does, may or shall pertain, in part, or in whole."

It was contended by the Insurance Company that the policy covered only the interest of the insured carrier. The court says on page 411:

> "The appellant admits that the policy covers the amount of the general average contribution paid by the appellee on its own goods on board the steamship, but contends that it is not liable under the policy for the amount of the contributions chargeable to the goods of which the appellee was not the owner, for the reason that the latter has no insurable interest therein. It is argued that as a common carrier or bailee the appellee could insure goods in its possession only against a risk which would expose it to loss or liability. There are some expressions

> found in the text-books which lend color to this view. Thus, in Gowan on Marine Insurance, 311, it is said: 'The liability for the general average on the policy of insurance cannot be greater than that of the assured on the contract of affreightment.' And in Wood on Fire Insurance, paragraph 294, concerning the insurable interest of a common carrier, it is said: 'But his right to recover beyond the extent of his own interest must depend on the circumstance whether he is liable to the owner for the loss.' "

The court then shows that the cases cited do not sustain the statements made in those texts. Again on page 412:

> "After a careful investigation of English and American decisions, we think the true doctrine is that a carrier has an insurable interest in goods in his possession as such, to the full extent of their value, against a loss for which it is possible that he may become responsible, and that the question whether he has the right to recover under the policy is not to be determined after the loss by inquiring whether in fact he is then liable to the owners of the property for the value thereof or for damage thereto."

The respondent attempted to distinguish these cases which were cited by libelant in the lower court, on the ground that in these cases the policies covered other interests besides those of the carrier such as "Who it may concern", etc., but no such distinction can be made, nor do the cases make any such distinction. In the cases cited, the carrier was suing as a bailee just as the libelant in the present case is doing. There can be no doubt that

this policy covers the libelant as a carrier and therefore as a bailee. The question of whether anyone besides the libelant has a right to sue on the policy, is not pertinent to this inquiry, and to put it frankly it is none of the respondent's business whether the libelant is compelled to pay over to the shippers any part of the insurance collected. The amount of respondent's liability is the same whether libelant pays all of the insurance to the shippers or nothing at all. The fact that the cargo owners might have been paid in full for their loss is immaterial as far as the carrier's liability is concerned. Respondent has failed to point out how a carrier would be relieved from liability by a third party paying the loss of the shipper and why in such case the third party would not be subrogated to the rights of the shipper against the carrier.

The rule on this branch of the case is correctly stated in "Joyce on Insurance", page 2018, Par. 925, as follows:

> "A carrier has an insurable interest in the goods intrusted to it for carriage that it may insure not only its interest or its liability, but the whole value of the goods; and upon so doing, may collect the whole value, and after reimbursing itself for its special loss, hold the surplus in trust for the owners. And insurance for the benefit of a carrier upon goods in its custody, if not limited to the insurance of its liability or interest, is an insurance of the whole value, and one in which the owner has therefore an interest; and extrinsic evidence is not admissible to control the effect of a policy in this respect by showing that the insurer and insured intended to insure only the interest or liability of carrier."

The libelant had the right to insure for full value and may sue for the proceeds primarily for its own benefit and the balance for that of its bailor. It is unnecessary to allege or prove that the owner of the paper had been paid by the carrier for the loss or even that the carrier is actually liable to the owner for the value of the paper.

II.

THE PAPER WAS DAMAGED BY A PERIL OF THE RIVER.

The agent of the libelant company, Mr. F. G. Wright, who answered the interrogatories attached to the respondent's answer stated that libelant was informed that the Steamer "*Ruth*" struck the bottom of the river and was beached to prevent sinking in deep water. The respondent contended in the lower court this was fatal to libelant's case because it appeared from the libel and the evidence that the vessel was first stranded and then sunk. There is no doubt that the damage was caused by the vessel striking the bottom of the river and just how far they succeeded in getting the vessel up on the beach after she struck the bottom is not very material. Besides Captain Hegdale did not testify that he attempted to keep the vessel off of the beach after she struck the bottom. It was before she struck that he tried to keep her off the beach so that she would not be stranded. He testified that when the vessel was stranded her bow was entirely up on

the bank (Apostles p. 51). The statements of the agent and the Captain are not inconsistent and even if they were, they would in no way injure the libelant's case. The agent did not pretend to have any personal knowledge of the accident and answered the interrogatory only upon his information and belief.

It appears from the Captain's deposition (Cross Exam. Apostles, pp. 47, 48 and 49) that the vessel, proceeding down the Willamette River, arrived at the confluence of that river and the Clackamas River. There was an island just to the south of the junction with the latter river, which formed two channels, the western channel being known as the low water channel, and the eastern channel which was used during the high water period. The water in the Willamette River was very high at that time and the Clackamas River was quite low, and this peculiar combination created an extraordinary condition in the rapid current of the east channel. The Steamer *"Ruth"* was caught in this current, her bow sheered off to starboard, and the current being too strong to back her, or to swing her, bow to port, she hit the east bank and stranded. The following is part of Captain Hegdale's testimony on cross-examination (Apostles pp. 49, 50 and 51).

> "Q. Did you ever have anything like a sudden sheer before? A. Oh, yes, I have.
> Q. That put her in toward the shore?
> A. Yes, sir.
> Q. Did she go on the shore before?
> A. No; I managed to stop her, until that time.

Q. Have you any explanation of the sheer at this time?

A. Any explanation for the cause of the sheer?

Q. Yes.

A. Well, only the swift current that the steamer was in, and going between the shore and an island, it was necessary to hold towards the shore to stay in the deep water, and the Clackamas River was very low, practically slack; the Willamette River was quite high; and the Columbia River was also very low, creating an unusually strong current, also current and slack water close to the east shore where she stranded. In order to keep her in the deepest water we had to steer a little to the east shore, and when the vessel was in the deepest water she was laying in the edge of an eddy formed on account of the slack water in the Clackamas. Thereby when we strived to get her to back, the current was too strong.

Q. When you started to get her to back?

A. Started to come out.

Q. Oh, to swing her bow out?

A. Swing her bow out.

Q. Out in the main river again?

A. In the main river again.

Q. Yes.

A. The current was so swift she would not answer fast enough to make it. She just sheered in to the shore. The channel is deep right up through to the shore. You can land it anywhere right at the shore on that side where she hit. In fact, the vessel when she stranded, her stern lay in twenty feet of water and her bow was entirely up on the bank."

In the case of the *"Morning Mail"*, 17 Fed. 545, the vessel struck a bridge by reason of the drift in the river and cross currents caused by the piers. The court held this to be a "danger of navigation".

This phrase was construed to be synonymous with "perils of the sea" in *Baxter v. Leland,* Fed. Cas. 1124.

In the *"City of Alexandria",* 23 Fed. 826, bales of tobacco were being carried on the lighter when a sudden gust of wind caused the lighter to careen and some of the bales fell into the water. The court decided the loss to be one due to a peril of the sea.

In the case of *Hibernia Insurance Co. v. St. Louis, etc. Transportation Co.,* 120 U. S. 166; 30 Law Ed. 621, the decision of the lower court was affirmed holding that it was a danger of navigation where one vessel struck a sand reef recently formed in the channel and another vessel struck a tree which had fallen into the channel by reason of the bank caving in shortly before the accident.

In *Hostetter v. Park,* 137 U. S. 30; 34 Law Ed. 568, a barge was sunk by some unknown and hidden object below the surface of the water. The court held the loss due to a "danger of navigation".

From the foregoing decisions we are certain that the combination of circumstances encountered by the Steamer *"Ruth"* on the voyage in question may properly be classified as a peril of the river, and that such peril was the direct and approximate cause of the loss.

The respondent claimed in the lower court that the loss was not caused by a peril insured against for the reason that it was caused by the libelant's negligence; that the libelant was negligent because

the burden of proof was on it to show that the loss was not caused by its negligence and that such burden was not met by the libelant. We take issue squarely with respondent, first, in regard to its statement on the burden of proof. The rule of law stated by respondent as applicable to an action on a policy of insurance is diametrically opposed to the general rule of contract law that where a defendant relies upon an exception in a contract for defense, he must bring himself within that exception by a preponderance of the evidence. The following cases cited by respondent in the lower court make no distinction between an insurance policy and other contracts in this regard, and establish no such rule as contended by respondent.

In the case of *Richelieu and Ontario Navgation Co. v. Boston Marine Insurance Co.,* 136 U. S. 408; 34 Law Ed. 398, it appeared from the evidence that the steamer was negligent in navigating with a defective compass and without a lookout and for running full speed in a fog. It was held that the insured could not recover on a policy without showing that the stranding was not caused by the negligence which had already been proved.

In *Western Assurance Co. v. Mohlman,* 83 Fed. 811, the policy provided:

> "If a building or any part thereof falls, except as the result of fire, all insurance by this policy on this building or its contents shall immediately cease."

It was held that that provision was a condition subsequent and in an action upon the policy the

burden was upon the Insurance Company to prove as a defense that the building fell before the fire; that such burden of proof was not changed by an allegation in the complaint that "the fire did not happen by * * * reason of any of the causes excepted in the terms of the policy". The court quotes from the case of *Blasingame v. Insurance Co.,* 75 Cal. 633, as follows:

> "One seeking to recover on an insurance policy must aver the loss showing that it occurred by reason of a peril insured against, but he need not aver the performance of conditions subsequent nor negative prohibitive acts, nor deny that the loss occurred from the excepted risks."

The case of *United States v. Atlantic Coast Line Co.,* 224 Fed. 165, involved the proper construction of an exception in a criminal statute describing a certain offense.

In the case of *Western Refrigerating Co. v. American Casualty Insurance Co.,* 51 Fed. 155, the policy covered all direct loss or damage, except that caused by fire or lightning. This is materially different from a policy covering against particular losses. In the latter class of cases the insured need only to bring himself within the terms of the policy by showing that the damage was directly caused by a peril insured against.

Union Insurance Co. v. Smith, 124 U. S. 405; 31 Law Ed. 497. The statement in this case relied upon by respondent as a statement of law is misleading unless it is explained why the court ap-

proved of the instruction given. In that case the Insurance Company objected to the instruction given by the lower court as follows:

> "The want of ordinary care at the time of the loss in Lake Erie must be shown by a fair preponderance of the proof on behalf of the defendant for the reason that the defendant sets it up in its special defense in the form of a special answer, and in that respect takes upon itself the establishment of the affirmative of that proposition."

In answering this objection the upper court points out that the lower court also in its instruction gave the instruction which was quoted in respondent's brief filed in the lower court. The court holds that the two instructions were proper in reference to the subject to which they related.

The case of the *Oceanic Steamship Co. v. Pacific Coast Steamship Co.,* No. 15,171, was not an action upon an insurance policy. It was an action upon a charter party by the owner against the charterer for liens upon the vessel which had attached during the time that the vessel was in the possession of the charterer. The warranty by the charterer did not cover liens which could be insured against under an ordinary marine policy.

The court says, in regard to the failure of the libel to allege that the claim in question could not be covered by insurance, that on account of the peculiar wording of the clause in the charter party the exemption from liability did not fall within the general rule which required that an exception be

pleaded and proved by the defendant. The exemption in that case was so worded as to form an integral part of the clause defining the respondent's liability. In the present case no claim is made that the exemption from liability is any different from that usually provided in policies of insurance and no special circumstances are alleged which would take it out of the operations of the general rule.

Unseaworthiness is always an excepted cause of loss under an insurance policy, but it is well established that the defense of unseaworthiness in such an action is an affirmative defense and must be established by the defendant Insurance Company. This was held in the very recent case of *American Marine Insurance Co. v. Margaret M. Ford Corporation,* (C. C. A.) 269 Fed. 768, where the court said:

> "As between the owner and insurer, the burden of proof that a vessel is unseaworthy rests upon the insurer", citing Fireman Insurance Co. v. Globe Navigation Co., (C. C. A.) 236 Fed. 618, and Thames Insurance Co. v. Pacific Creosoting Co., (C. C. A.) 223 Fed. 561.

This is also the rule in the State courts as appears by the recent case (1921) of *Sears v. Pacific Mutual Life Insurance Co. of California,* 196 Pac. 235. In that case it was held that where an Insurance Company attempts to avoid payment of a policy under an exception in the policy, the burden of proof is upon the Insurance Company to show that the facts of the case are within the exception.

In the present case, there appears in the evidence a full explanation of the circumstances surrounding the stranding, and nothing is left to inference. Consequently there is no occasion for any presumption of negligence. The facts appearing from the evidence certainly do not show that the accident would not have happened if the master of the *"Ruth"* had gone through the east channel of the river instead of the west channel. By the same reasoning, the accident would not have happened if the libelant had shipped the paper by railroad instead of by boat. The test of negligence is not whether after the accident and a review of the facts and events which lead to it, someone would have operated the vessel differently on that occasion. The test is, did the master of the *"Ruth"* take such action as an ordinarily prudent master of a river steamer would take if placed in the same circumstances just prior to the accident? The rule was long ago established in the case of the *"Carl Frederick"*, 33 Fed. 589, that

> "when the primary cause of disaster is shown to be a peril of the sea, the proofs should be clear that it might have been prevented by the exercise of reasonable skill and diligence. Error of judgment ought not to create a liability unless the error be such as to show incapacity or the want of that degree of professional skill which reasonably may be expected of a master. It must also plainly appear that but for that error the damage would have been avoided or partially mitigated."

The respondent claimed that the master knew that he could have drifted safely through the other

(East) channel, and quoted certain portions of the master's testimony in attempting to support that claim. A more complete reading of the master's testimony shows that the West channel was the one used during the high water periods, and that at the time in question the water in the river was very high; that the high water channel was safer because it was much straighter and wider, and the current was approximately the same as the current in the Eastern channel; that the Eastern channel was too crooked to run at all with the engines going ahead, and that the only way that that channel could be navigated was to drift it. The Eastern channel was used only when the water was too low in the Western channel. This lends no support whatever to respondent's claim that drifting through a channel is the safest method of navigation and therefore should be followed in all channels of swiftly moving current. The fact is that that method was adopted in the Eastern channel because it was the only way possible to get through that channel. It does not necessarily follow that the Eastern channel was safer than the Western channel, nor that the Western channel should have been navigated in the same manner.

The master further testified that prior to the accident in the present case he had had trouble with the same steamer in navigating the Eastern channel, and his steamer was carried around and landed across the channel. He denies that the Western channel could be navigated with greater safety by drifting with the engines reversed, and

testified that the Western channel was straight and therefore could be navigated with much greater safety under the method which he adopted.

The master's testimony brings him well within the rule requring reasonable skill and diligence and respondent has offered no testimony in rebuttal.

III.

PROOFS OF LOSS WERE FURNISHED TO RESPONDENT.

On February 24, 1913, libelant sent the following letter to the agents of the respondent in Portland, Oregon (Libelant Exhibit 8, Apostles page 137):

> "We are advised by Mr. Wm. Pierce Johnson, President of our company and located in San Francisco, that the Hartford Fire Insurance Co. are liable under Cargo Policy #304 for their proportion of the loss of cargo on the Str. 'Ruth' which went aground below the Clackamas Rapids on January 11th, and in accordance with this request we enclose herewith detailed claims amounting to $5621.85, which he suggests that you forward to San Francisco office for settlement."

This letter was answered by them on February 28, 1913, as follows (Libelant's Exhibit 9, Apostles pages 138 and 139):

> "We acknowledge receipt of your letter of the 24th inst. enclosing statement of loss of cargo on the Steamer 'Ruth'. This comes to us as somewhat of a surprise, as we understood from Captain Crowe that this matter had been closed up with the Standard Marine, their policy covering all the loss, inasmuch as it was specific insurance.

The statement that you enclosed is not quite clear. When the loss occurred we sent Mr. W. B. Honeyman to the wreck immediately to superintend salvage operations for the Hartford. He was there two days and returned and informed us that Captain Crowe had been placed in charge by the Standard Marine, the cargo being insured on the Standard Marine specifically.

We do not know the nature or extent of the interest of the Willamette Navigation Company in this cargo and the claims growing out of the loss, consequently are at a great disadvantage in laying the case before the Hartford's home office at Hartford, in fact we are so devoid of information that our position is humiliating. Could you not inform us as to the contracts between yourselves and the Paper Companies on which your claim is based, also the amount and terms of insurance carried on this cargo by other companies, this information will be required before an adjustment can be made.

We are anxious to make a speedy and satisfactory settlement of this claim as it is our business to give the very best service to our clients, but unless we have detailed information you can readily see that our hands are tied.

Trusting that at an early date you will be able to give us the necessary particulars, we are,

Yours very truly,".

Apparently, this last letter did not come to the attention of the libelant in due course for it wrote again on May 1, 1913 to respondent, requesting a reply to its letter of February 24. (Libelant's Exhibit 11, Apostles page 143.) This letter was answered by respondent on May 16, 1913 (Libelant's Exhibit No. 12, Apostles page 144), saying that the

matter had been referred to the Adjuster in San Francisco. On May 22, 1913, respondent again wrote to libelant in reference to another claim amounting to $1158.80 and requesting that proofs of loss which had been sent to libelant in connection with that claim be executed by libelant and returned to respondent. (Libelant's Exhibit 14, Apostles page 146.) To this letter libelant answered May 26, 1913 (Libelant's Exhibit 15, Apostles page 147), as follows:

> "Yours of May 22nd received. We have written to Mr. Johnson in San Francisco today asking that the proof of loss covering the Crown-Columbia Paper Co.'s loss be returned to your San Francisco office as soon as possible. The draft which you refer to amounting to $1158.00 covers the loss of the Crown-Columbia Paper Co. while our letter of February 24th enclosed copy of claim filed by the Willamette Pulp & Paper Co. for their loss and it is regarding the disposition of this claim that we would like to have your reply."

Respondent answered on June 2, 1913 (Respondent's Exhibit C, Apostles page 149), that the loss had been paid by the Standard Marine Insurance Company and that no claim had been made on the respondent by the libelant for the loss of the paper belonging to the Willamette Pulp & Paper Company.

Libelant's letter of June 3 (Respondent's Exhibit D, Apostles page 151) acknowledges respondent's letter of June 2 and states that the libelant's records show that the claim still stands. On June 13,

1913, the libelant, through its attorney, sent the following letter to respondent at San Francisco (Libelant's Exhibit 1, Apostles page 87):

> "Enclosed herewith please find statement of loss of Willamette Pulp & Paper Co., on steamer *'Ruth'*, claim for which has been made against the Willamette Navigation Co., which statement I promised to sent you the other day, but which has been delayed on account of a rush of other matters in the office.
>
> I have been unable to make up the formal claim which I told you that I would furnish you the other day, on account of not having at hand a copy of the bill of lading which I desired to attach to it, but this will follow in due course, unless by reason of your settlement of the claim for loss sustained to the shipment of the Crown Columbia Paper Co., you are already in possession of the data necessary to enable you to pass upon the claim, the statement of which I am enclosing.
>
> It was my understanding that formal proof of loss and proof of interest in the property, a statement of which is herewith enclosed, had already been made and from the fact that a representative of your company went out to the vessel where she was stranded immediately after the loss, I assume that you are in full possession of all of the details with reference to a particular account of the loss, with the causes and extent thereof. The Willamette Navigation Co. had no other insurance upon the property insured under the policy at the time of the loss.
>
> In my conversation with you, upon Tuesday, I neglected to mention, what you perhaps already know, that the only cargo on board the *'Ruth'* at the time of the loss was paper in rolls and bundles shipped by the Crown Columbia

Paper Co. and Willamette Pulp & Paper Co., consigned to themselves at Portland.

If there is any further or additional information that you desire, with reference to the claim, the statement of which I am enclosing, kindly let me know and I will see that it is furnished you."

The statements referred to in the above letter are set out on page 172 and following pages of the Apostles and are marked Libelant's Exhibit 20. This letter was acknowledged by respondent on June 17, 1913, and libelant was advised in that letter that the matter had been transmitted to the General Agent of the respondent company at Hartford, Connecticut (Libelant's Exhibit 2, Apostles page 95).

On September 17, 1913, libelant, through its attorney, sent the following letter to respondent at San Francisco (Libelant's Exhibit 4, Apostles page 120).

"Referring to my letter to your Mr. Adam Gilliland, Assistant General Agent, under date of June 13, 1913, and the statement therein made that as soon as I obtained the bills of lading for the paper mentioned in the claim of the Willamette Pulp & Paper Co. against the Willamette Navigation Co. for its shipment on the steamer 'Ruth' I would forward them to you, these bills of lading have just been received and I am forwarding you herewith copies thereof. The originals are subject to your inspection if you so desire.

As stated in my letter above referred to, I believe that you are in full possession of all the details with reference to a particular account of the loss, with causes and extent thereof, as well as the nature of the interest of the

Willamette Navigation Co. in the property, inasmuch as you have paid the Willamette Navigation Co., under your policy No. 304, the damage suffered by the loss of the paper of the Crown Columbia Paper Co. The statement of the loss of the Willamette Pulp & Paper Co., (claim for which has been made against the Willamette Navigation Co.) was sent you in my letter under date of June 13, 1913, and this claim for $5621.85 is of exactly the same character as that of the Crown Columbia Paper Co., so that you are undoubtedly in possession of all of the information necessary to enable you to pass upon it. Under the terms of your policy, loss is agreed to be paid within thirty days after proof thereof, and we shall be glad to receive payment of this loss within thirty days from the date hereof.

I repeat our offer to furnish you with any further or additional information that you desire with reference to this claim, as well as any further form of proof of loss."

The form of the bills of lading referred to in the above letter is set out on page 126 and following pages of the Apostles. Apparently this letter was never answered.

In addition to the foregoing proofs of loss, it appears from the evidence that respondent had a representative on board the Steamer *"Ruth"* within two days after it had stranded. (Report of Wm B. Honeyman, Libelant's Exhibit 17, Apostles page 153; Libelant's Exhibit 18, Apostles page 155). Also a full report of the loss was made to respondent's branch office on the Pacific Coast and to its home office in Hartford, Connecticut. At no time prior to the filing of the libel in this case did respondent

ever complain or offer any objection to any alleged insufficiency in the form or substance of the proofs of loss offered by libelant, or that they were not given within thirty days from the time of the loss. Respondent expressed surprise that the claim was made because as it said the loss was paid by the Standard Marine Insurance Company, but it requested information in regard to the contracts between libelant and the shippers. (Libelant's Exhibit 9 Apostles page 138.) This request was complied with by forwarding to respondent copies of the bills of lading as soon as they could be obtained by libelant. (Libelant's Exhibit 4, Apostles page 120.) The respondent also claimed that the loss on this policy had been paid by it (Libelant's Exhibit 14, Apostles page 146) and its home office claimed that in no way could the policy be construed to cover paper belonging to the Willamette Pulp & Paper Co. (Libelant's Exhibit 22, Apostles page 189.) The only objection ever made by respondent to the proofs of loss either in regard to the form or to the time of furnishing them was made by their counsel at the trial of this case. This is sufficient to bar respondent from urging any such objection at this time.

The following cases, together with the excerpts taken therefrom, are in point:

Petit v. German Ins. Co., 98 Fed. 800.

> "If the defendant, as is alleged, had verbal notice of the loss, further notice would seem to be useless and unnecessary, if the defendant company acted upon it. It is true that the

> policy requires that the notice should be in writing, but the defendant company must be held to have waived that stipulation of the contract when it acted promptly upon the verbal notice, and sent its adjusters to the place where the fire occurred to examine into the loss occasioned by the fire. It was, therefore, estopped in requiring a notice of the loss as provided for in the policy of insurance, and as to this objection the demurrer is overruled."

In the case of *Hurt v. Employers' Liability Assur. Corp.* 122 Fed. 828, the plaintiff alleged in his complaint that he had given notice of the accident covered by the policy in suit and thereafter submitted full proofs of loss, which were accepted and held by defendant after their delivery without any objection. The court observes (p. 833) that it is a well settled rule that where defective proofs are furnished within the prescribed time, if the Insurance Company retains them without objection, it thereby waives all objections (citing numerous cases, and then continues):

> "As against the claim of the company in this case that all rights of the insured were forfeited and lost by reason of the failure to give notice within 30 days after the accident occurred, and as supporting the doctrine of the Kentucky cases, we may advert to that of the Supreme Court announced in Insurance Company v. Eggleston, 96 U. S. 577, 24 L. Ed. 841, 'that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture'. Supplementing this is the view of the Supreme Court of Wisconsin in the case above cited from 82 Wis. 112, 51 N. W.

1122, 33 Am. St. Rep. 29, where it was said that, 'to prevent forfeiture, courts are bound to construe such contracts as strongly against the insurer and as favorably for the insured as their terms will reasonably admit'. So that if, by any possible construction, it could be held that there might have been a forfeiture in this case, we ought still to hold, on the admitted facts, that it has been waived by the 'requirement', the 'receipt', and the 'retention, without objection', of the notice and proofs, averred in the petition to have been given."

Royal Insurance Co. v. Martin, 192 U. S. 154; 48 L. Ed. 385, on p. 389:

"But this company made no demand for proofs on this point. On the contrary, the formal production of such proofs was, in effect, waived; for the company assumed that what occurred in the locality at the time of the fire constituted a riot, which relieved it from all liability. It, therefore, gave notice by its agents that, as the fire and the destruction of the goods were produced by a riot, they were not compelled to pay, and that 'the policy would not be paid'. A general, absolute refusal to pay in any event, or a denial by the company of all liability under its policy, dispensed with such formal proofs as a condition of its liability to be sued, and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by evidence."

Scottish Union & National Ins. Co. v. McKone, 227 Fed. 813, on p. 815:

"The proofs of loss were received by the insurance company and retained, and on September 27, 1913, one James Hopkins, an ad-

juster, acting for the defendant, was sent to the plaintiff, and examined him before a notary public touching the loss sustained by the fire. We think that the receiving of the proofs of loss without objection by the company, and the sending of an adjuster to the insured to examine him in connection with the loss, without any objection being made as to the immediate written notice, constituted a waiver of the requirement of the policy in this respect."

American Marine Ins. Co. v. Margaret M. Ford Corp., 269 Fed. 768 on page 771:

"We think the proof of loss is sufficient. The object of proof of loss is to give information to the insurance company as to the facts rendering it liable. A substantial compliance with the terms of the policy is sufficient. *Globe & Rutgers Ins. v. Prairie Oil & Gas Co.,* 248 Fed. 452, 160 C. C. A. 462. On March 23, 1918, the plaintiff in error advised of the fact that the vessel had been damaged and that extensive repairs were necessary. On March 26, 1918, they were again informed when a copy of a letter addressed to the cargo underwriters was sent to them advising about further loss. A copy of the survey of March 25 and April 9 shows that specifications were sent to them on April 11, and on April 12 formal notice of abandonment of the vessel was sent. Acknowledgment of such a letter was made by the plaintiff in error. All the bids upon the specifications were sent to the plaintiff in error. We think this was sufficient compliance with the terms of the policy as to notification of loss, since it further appears that liability was denied on the ground of unseaworthiness of the vessel by the plaintiff in error. Further proofs of loss were waived after such a position was assumed. *Royal Ins. Co. v. Martin,* 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385."

From the long and drawn out correspondence between the libelant and respondent, negotiating for a settlement of this claim, during which time no objection was ever offered by respondent to the proofs of loss made by libelant, we feel fully justified in asserting that respondent itself has no faith in this defense set out in its answer, and that it will not be seriously urged on this appeal. The most that respondent contended for in the lower court, in regard to the proof of loss, was that it had the right to demand that libelant should furnish proof which complied with the requirements of the policy in every respect. We have no quarrel with that contention. The respondent, however, totally ignores the fact that no such demand was made and also ignores the law on the question of waiver. This cannot be construed otherwise than as an admission that libelant's contentions in regard to the proof of loss are correct.

IV.

LIBELANT'S CLAIM HAS NOT BEEN PAID.

The opinion of the learned District Judge leads us to believe that the lower court agreed with the libelant's statements on the law of the case, as set out in the foregoing sections of this brief; but that the court fell into error in making a conclusion of fact from certain undisputed facts concerning a receipt in full, given to the respondent company for all claims by libelant against respondent under the

policy. At the trial, and also in its opinion, the court stated that it could not understand why a receipt for settlement in full of all claims should be given when a larger claim was still held pending, but as the court asked further questions on that point at the trial, we thought that the situation had been made clear to the court. The respondent's contention in the lower court that the written instrument (the receipt) could not be varied by parol evidence further strengthened our belief that this was not the main issue in the case. The consequence was that we did not set out in our brief a recital of the circumstances surrounding the execution of the receipt as fully as they would have been set out had we suspected that they were still not clear to the court. The situation is as follows:

The libelant had two claims against the respondent company for paper damaged on the Steamship *"Ruth"*, one for paper belonging to the Crown Columbia Paper Company for $1158.80, and the other one, the subject of the present suit, the paper belonging to the Willamette Pulp & Paper Company. On February 24, 1913, the libelant, through its office at Oregon City, Oregon, demanded payment of the respondent for the loss on damaged paper belonging to the Willamette Pulp & Paper Company in the sum of $5,621.84, (Libelant's Exhibit 8, Apostles p. 137). This demand was made upon Henry Hewitt & Co. of Portland, Oregon, who were the agents of the respondent company in that city, (Apostles, p. 138.)

On February 28, 1913, Hewitt & Co. answered that they understood that the claim had been paid by another insurance company and requested additional information. (Libelant's Exhibit 9, Apostles p. 138.)

On March 3, 1913 libelant answered the letter and requested Hewitt & Company to refer the claim to the San Francisco office of the respondent company. (Respondent's Exhibit B, Apostles p. 148.)

On March 11, 1913 Hewitt & Co. advised libelant at Oregon City that they had referred the claim to the San Francisco office of the respondent company. (Libelant's Exhibit 16, Apostles p. 152.)

About this time a claim was made by the San Francisco office of the libelant company on the loss of the paper owned by the Crown Columbia Company, which was referred by the respondent to its home office in Hartford, Conn. The claim made by libelant's Oregon City office on the paper belonging to the Willamette Pulp & Paper Company was also referred by respondent to its home office in Hartford.

On March 20, 1913 respondent's home office advised its San Francisco office (Libelant's Exhibit 22, Apostles p. 189) that there was no liability under the policy for the loss of paper belonging to the Willamette Pulp & Paper Company because the policy insured only the interests of the Willamette Navigation Company in the paper. It expressed a doubt, however, as to its liability on the loss of the

paper owned by the Crown Columbia Company because that company carried no insurance on its paper, and it was stated in the letter that the home office would further consider this claim. Thereafter, the libelant convinced respondent that it had paid the Crown Columbia Company for the loss of its paper and that the respondent company should repay the libelant. (Apostles, p. 108.) As soon as the respondent company indicated a willingness to pay for the loss of the paper belonging to the Crown Columbia Company, libelant, through its San Francisco office attempted to collect that claim through attorney Oscar Sutro. By reason of the fact that respondent still denied liability on the loss of the paper belonging to the Willamette Pulp & Paper Company, and as the latter company had been paid for its loss by the Standard Marine Insurance Company, that claim was not urgent, and no further action was taken on it at that time. It was never referred to Oscar Sutro for collection by the libelant company, as will appear from Mr. Sutro's testimony hereinafter set out.

The respondent tendered a form for the proof of loss on the claim for paper belonging to the Crown Columbia Company, but it was unsatisfactory to libelant, and libelant tendered its own proof of loss, which was accepted by the respondent company. (Apostles, p. 115.) It was dated April 24 although Mr. Sutro testified that it was delivered and accepted several days afterwards. That is not at all material. The point is that it was accepted as satis-

factory by the respondent company. This proof of loss on the claim for the paper belonging to the Crown Columbia Company provides that (Libelant's Exhibit 19, Apostles p. 162):

> "The cash value of the property belonging to and owned by the Crown Columbia Paper Company at the time of loss, the loss and damage on the same for which claim is hereby made, the total insurance upon said property, the total claim for loss under the entire insurance on said property and the insurance and claims under this policy upon said property belonging to and owned by the Crown-Columbia Paper Company is * * * $1158.80.
>
> And the insured hereby claims and agrees to accept from the Hartford Fire Insurance Company by reason of said loss and damage to said property belonging to and owned by said Crown Columbia Paper Company the sum of $1158.80 in full satisfaction of all liability under said policy for said loss and damage to said property belonging to and owned by said Crown-Columbia Paper Company.
>
> The amount of sound value herein stated does not exceed the cash market value at the time of the said loss of the said property so damaged and so destroyed. The said property belonging to and owned by said Crown-Columbia Paper Company on which this claim for loss is made belonged to and was owned by said Crown-Columbia Paper Company under an agreement with the Willamette Navigation Company, under which the latter company assumed responsibility for marine perils, and under which said last mentioned company has paid said Crown-Columbia Paper Company."

Under date of April 24, 1913 Mr. Sutro, as attorney for libelant, executed and delivered to re-

spondent the following receipt, (Respondent's Exhibit A, Apostles p. 98):

"April 24th, 1913.

"Received of the Hartford Fire Insurance Company, through Palache & Hewett, Genl. Agents at San Francisco, the sum of Eleven Hundred Fifty Eight & 80/100 Dollars, being in full satisfaction and compromise settlement of all claims and demands against the said Company for loss or damage by ~~Fire~~, ~~Theft~~, ~~Collision~~ Stranding Str. 'RUTH' which occurred on the 11th day of January, 1913 to the ~~Automobile~~ property described under Cargo Policy No. 304 of said Company.
$1158.80.

Willamette Navigation Company,
By Oscar Sutro."

The Standard Marine Insurance Company, having paid in the form of a loan the Willamette Pulp & Paper Company for its loss, and thereby having been subrogated to the rights of that company against the carrier, the libelant herein, the libelant became uneasy at this club being held over its head. On May 1, 1913, the Oregon City office of the libelant company made inquiry as to the protection which it rightfully supposed it had under respondent's policy of insurance, and requested the respondent's agents in Portland to answer libelant's letter to them dated February 24, 1913. (Libelant's Exhibit 11, Apostles page 143.) Respondent's agents then answered saying that the matter had been referred to the adjuster in San Francisco. (Libelant's Exhibit 12, Apostles p. 144.) On May 22, 1913, respondent's agents again wrote to libelant

saying that (Libelant's Exhibit 14, Apostles p. 146):

> "We are just in receipt of a letter from the San Francisco office of the Hartford Fire Insurance Company which states that on April 24, $1158.80, the amount of loss under the above mentioned policy, was paid to the Willamette Navigation Company."

Proofs of loss were also requested. The libelant then called the respondent's attention by letter dated May 26, 1913 (Libelant's Exhibit 15, Apostles p. 147), to the fact that respondent was in error in regard to the payment of the claim; that the payment referred to in its letter covered paper belonging to the Crown Columbia Company, while the claim being made was on paper belonging to the Willamette Pulp & Paper Company. The respondent then abandoned its contention that the latter claim had been paid and took the position that it was not liable because the loss had been paid by the Standard Marine Insurance Company and no claim for that loss had been made by the libelant through its San Francisco office on the respondent company. (Respondent's Exhibit C, Apostles p. 149.) The contention by respondent that this claim had been paid by respondent was revived by respondent's counsel in drawing its answer to the libel in the present case.

The respondent's witness Oscar Sutro testified in part as follows, in reference to the circumstances under which the receipt was given (Apostles, pp. 106, 107, 108, 109, 110, 111, 112, 117, 118 and 119):

"Q. And the two different companies, one was the Crown-Columbia Paper Company, wasn't it? A. Yes.

Q. And that was damaged to the extent of $1158.80? A. Yes.

Q. There was another consignment belonging to the Willamette Pulp & Paper Company, wasn't there? A. Yes.

Q. And that was damaged to the extent of $5621.85? A. Yes.

Q. May I put it this way, Mr. Sutro: In executing the receipt which you did upon April 24, 1913, for the payment to the Willamette Navigation Company of that sum, the amount in question is exactly the amount of the shipment belonging to the Crown-Columbia Paper Company?

A. *It was the damage to the Crown-Columbia Paper Company which the Hartford Fire Insurance Company paid to the Willamette Navigation Company.*

Q. And that is the amount that you understood you were being paid, isn't it?

A. *That was the amount that we were being paid. The Willamette Navigation Company paid the Crown-Columbia Paper Company the amount of that loss and the Hartford Fire Insurance Company reimbursed the Willamette Navigation Company for that payment. I am very clear about that.* The paper is evidence of it.

* * * * * * *

A. It is a proof of loss and was intended to be for the paper which had been shipped by the Crown-Columbia Paper Company, which was damaged, and for which the Willamette Navigation Company paid and for which the Willamette Navigation Company was reimbursed by the Hartford Fire Insurance Company. That was very clear amongst all of us.

* * * * * * *

Q. Why was this claim pressed to a settlement and a receipt given apparently in full for all claims while a much larger claim was held in abeyance?

A. Because the Willamette Navigation Company considered itself liable to the Crown-Columbia Company for the loss to the Crown-Columbia Paper Company paper, and it did not consider itself liable for the Willamette Pulp & Paper Company for the loss to the Willamette Pulp & Paper Company's paper; the Navigation Company was insured by the Hartford Fire Insurance Company. Whether it had a sound or an unsustainable claim against the Hartford Fire Insurance Company, the Navigation Company did satisfy the Hartford Fire Insurance Company that as it, the Navigation Company, had paid the Crown-Columbia Paper Company, the Hartford Fire Insurance Company should repay the Navigation Company.

* * * * * * *

A. The Hartford Fire Insurance Company disputed its liability; what finally satisfied the Hartford Fire Insurance Company that as matter of either legal principle or business policy it should pay the claim was the exhibition to the Hartford Fire Insurance Company of a letter that the Crown-Columbia Company had shipped only on condition that the Navigation Company would pay any losses.

* * * * * * *

The COURT. You have made the difference clear as between the outsiders and the company, but it is not quite clear yet to me why a receipt should be given in full and the Navigation Company still hold a claim nearly five times the amount; was that under discussion between the companies at all?

A. Yes; the Navigation Company considered that it had a claim——

Q. And pressing that claim?

A. For this sum?

Q. For $5000 odd.

A. Oh, no, it considered that it had a claim for the loss to the Crown-Columbia Company's paper, and that was paid. The Navigation Company did not own the Willamette Pulp & Paper Company's paper, that was owned by the shipper, the paper company, the Willamette Pulp & Paper Company. The Navigation Company would have no claim against its insurer if it, itself, was not liable to its shipper.

* * * * * * *

The COURT. I still cannot get it into my head why the receipt for settlement in full of all claims for the sinking of the *'Ruth'* should be given when you only had in mind about $1000, and in the background over $5000.

A. (continuing) Because that was the only money that the Navigation Company considered itself legally liable.

Q. Was this a settlement of a disputed liability, a liability disputed in toto, by which the Insurance Company paid $1000 because, in good faith, it ought to pay that, or in good morals, rather, because the company had to pay it out of something else? Was that the basis of that whole sum of $1100—odd?

A. I suppose that is what this lawsuit is about; but to answer your question as best I can, *I don't remember that the Navigation Company ever asserted its claim against the Hartford Fire Insurance Company for the $5000 amount.*

* * * * * * *

A. I do not believe that the Willamette Navigation Company asserted any claim against the Hartford Fire Insurance Company prior to the payment of that sum for the loss to the Willamette Pulp & Paper Company's paper. Am I not correct in that?

* * * * * * *

Redirect Examination.

Mr. HENGSTLER. Q. Mr. Sutro, with reference to that receipt on the 24th of April, as I understand it from your testimony, the situation was this: You had, for the libelant, two claims against the Insurance Company, and there was a controversy about those claims, the Insurance Company denying liability under each one of them, but they finally agreed to pay the smaller one, with the understanding that that should settle the whole indebtedness? Is not that the situation?

Mr. LILLICK. That is objected to as beind leading and suggestive.

The COURT. Objection overruled.

A. I am not sure that that is a correct statement of the situation, Doctor; I am not at all sure that the Willamette Navigation Company ever made a claim against the Hartford Fire Insurance Company prior to the date of this payment for more than the damage to the paper of the Crown-Columbia. As I remember the situation, the Willamette Navigation Company considered itself liable to the Crown-Columbia Paper Company for the loss of that paper, and we had either paid that loss or knew that we were going to pay it. I am not sure that we went any further in our claim against the Hartford than the collection of the amount which we either already had paid the Crown-Columbia, or which we knew we were going to pay them. Your question began with the statement that we made two claims against the Hartford—I don't think we ever did at that time.

The COURT. Q. Everybody knew, didn't they, that a much greater damage had occurred than this amount of $1100?

A. Yes, but the damage was to the paper of the Willamette Pulp & Paper Company.

Q. But if one were covered by the policy, the other would be?

A. Well, not necessarily, as I understood it; Mr. Lillick disagreed with me on that at that time. The policy, according to the contention of the Hartford Fire Insurance Company, covered niether claim, because our bill of lading did not protect our shippers. That was the contention of the Hartford Fire Insurance Company. It was only because we had a special agreement with the Crown-Columbia that, regardless of the terms of the bill of lading, we, as the ship owners, would pay their loss, it was because we had that special agreement to indemnify the Crown-Columbia that we persuaded the Hartford Fire Insurance Company that the portion of the loss which we had made good to the Crown-Columbia should be reimbursed to us. So far as I know, we never did pay the Willamette Pulp & Paper Company anything, and consequently, we could not claim against the Hartford Fire Insurance Company."

These are the facts. They are established by the testimony of respondent's own witness and they are undisputed. Consequently, we say that the court erred in making a deduction of fact from undisputed facts. In this situation the lower court was in no better position to judge whether or not the receipt was given in settlement of the claim for paper belonging to the Willamette Pulp & Paper Company than is this court. The appearance and manner of testifying by the witnesses would give no assistance whatever because the veracity of the witnesses is not in question. There is no conflict in the testimony. It is purely a question of whether or not the undisputed facts will justify the conclusion of the trial court that it was the intention

of the parties to settle all of libelant's claims under the policy for the small sum named in the receipt. The lower court was clearly in error in holding that such was the intention of the parties for the following reasons.

1. The rule that oral evidence cannot be received to alter or vary the terms of a written instrument has no application to receipts. This is the rule of every State in the Union, and it is also the rule of the Federal courts. In *Beall v. Hudson County Water Co.,* 185 Fed. 179, the court said on page 181:

> "Receipts are not conclusive; they are not within the inexorable rule prohibiting the introduction of oral evidence to vary or contradict the terms of a written agreement; they may be explained and even contradicted. Peter v. Beverly, 35 U. S. 532, 567; 9 L. Ed. 522; Sutton v. The Albatross, 2 Wall., Jr., 237; 23 Fed. Cas. 465, No. 13,645; The Kimball, 70 U. S. 37; 18 L. Ed. 50; Atlas S. S. Co. v. Colombian Land Co., 102 Fed. 358; 42 C. C. A. 398; Swain v. Frazier (E. & A.), 35 N. J. Eq. 326; Campbell Mfg. Co. v. Rockaway Pub. Co. (E. & A.), 56 N. J. Law 676; 29 Atl. 681; 44 Am. St. Rep. 410; American Brick Co. v. Drinkhouse, 59 N. J. Law 462; 36 Atl. 1034; Taylor v. Wahl, 72 N. J. Law 10; 60 Atl. 63."

In *Haas Bros. v. Hamburg-Bremen Fire Ins. Co.* (C. C. A., 9th Circuit), 181 Fed. 916, it was held that the words in a receipt for payment of claims under an insurance policy "in full of all such claims" were not conclusive terms of the receipt and that parol evidence was admissible to show the agreement under which the receipt was executed.

2. Attorney Oscar Sutro was never authorized to collect the claim on the paper belonging to the Willamette Pulp & Paper Company. That claim was made through libelant's Oregon City office and there is no evidence that Mr. Sutro was ever authorized by libelant to collect it or negotiate with the respondent concerning it. Mr. Sutro himself testified that he made no attempt to collect the claim on the paper owned by the Willamette Pulp & Paper Company because he believed that libelant did not have a valid claim for that loss. He testified that he believed libelant company had a valid claim for the paper belonging to the Crown-Columbia Company because the libelant had paid that company for its loss, and therefore libelant had a valid claim against respondent for reimbursement; that it was for that claim on the paper belonging to the Crown-Columbia Paper Company that the Hartford Fire Insurance Company reimbursed the Willamettte Navigation Company. There is not a word of testimony in the record that Mr. Sutro ever attempted to collect from respondent libelant's claim on the paper belonging to the Willamette Pulp & Paper Company, or that he even negotiated with respondent company concerning that claim.

3. It conclusively appears from the record that Mr. Sutro had no express authority from the libelant company to collect from respondent company its claim on the paper belonging to the Willamettte Pulp & Paper Company, nor did he ever have any such ostensible authority. Even if he were the

general counsel for the company, he would have no authority as such counsel to select such causes of action as he thought the company might have against other parties and negotiate with the third parties concerning such claims or to bring suit upon them. He would have authority to act only on such causes of action as were delegated to him by the company. Even if he had an actual authority to act on any claim which the company might have, he would have no ostensible authority to settle that claim—certainly not to settle claims amounting to about $6700 for a little over eleven hundred dollars.

Holker v. Parker, 11 U. S. (7 Cranch) 436;
Harper v. National Life Ins. Co. (C. C. A.), 56 Fed. 281;
United States v. Beebe, 180 U. S. 343 at 352.

Of course the attorney's action would be binding in such case if it were subsequently ratified by his client, but no such ratification was claimed in the present case, nor could it be so claimed. It is a fact that the libelant received the money, but it believed, as it had a right to believe, that it was in settlement for the loss of paper belonging to the Crown-Columbia Company. It immediately objected to the draft of the proof of loss proposed by respondent on instructions from its office in Oregon City (Libelant's Exhibit 10, Apostles p. 140) on the ground that in the form as proposed it would prevent libelant from making a claim for paper belonging to the Willamette Pulp & Paper Company.

Also on May 1, 1913, the demand on that claim was renewed by the libelant against respondent (Libelant's Exhibit 11, Apostles p. 143.)

4. Libelant's claim for the paper belonging to the Crown-Columbia Company was for the sum of $1158.80, and the proof of loss for that claim, accepted by respondent, is for the sum of $1158.80. The receipt is for the sum of $1158.80. True the receipt uses the word compromise and it was in fact a compromise of that claim because that claim was disputed. The respondent contended that the policy covered only the interest of the libelant company in the paper. The libelant on the other hand contended that because it was liable to the Crown-Columbia Company for the loss of the paper, and paid the loss, the respondent company should reimburse the libelant. This dispute was settled, and if the parties chose to call it a compromise, they were at liberty to do so. It may have been also that other disputed points were settled. It might be that the libelant waived the interest on its claim against the respondent, or that libelant discovered that the loss on the Crown-Columbia Company claim was much larger than it had at first supposed. There may have been a dozen other reasons for the use of the word compromise in the receipt, but the essential point is that there is no evidence that it included the claim against the respondent for the damaged paper owned by the Willamette Pulp & Paper Company. On the contrary, it affirmatively appears that the receipt was not intended to cover that loss.

5. The receipt was drawn by the respondent company. There is direct testimony to that effect (Apostles p. 183) and the receipt shows on the face of it that one of the company's forms was used and altered to suit the particular purpose. This is evidenced by the fact that the words, "fire", "theft", "collision" and "automobile" are stricken out of the form by having lines drawn through them. In such case the receipt should be construed most strongly against the respondent company and every doubt should be resolved in favor of the libelant.

6. At the time that the receipt was given, on April 24, 1913, the respondent knew that the libelant was asserting two claims against it, one through its office in Oregon City for the paper belonging to the Willamette Pulp & Paper Company, and the other, through Mr. Sutro, for the paper belonging to the Crown-Columbia Company. On the other hand, Mr. Sutro knew only that the libelant was asserting one claim—that of the Crown-Columbia Company, which had been referred to him for collection. He did not know that the libelant company was asserting a claim for the paper belonging to the Willamette Pulp & Paper Company, and in fact he did not believe that libelant had a valid cause of action on that claim. In that situation, the representative of the respondent, with the knowledge which he had regarding the two claims, walked into Mr. Sutro's office with a draft for the amount of the claim due on the paper belonging to the

Crown-Columbia Company, presented it to Mr. Sutro, together with a receipt drawn in the usual form, and said nothing whatever about the libelant asserting a claim for the paper belonging to the Willamette Pulp & Paper Company. The draft was taken and the receipt was signed in the same casual manner that any receipt is signed in a busy office when money is paid in discharge of a debt. The concealment by respondent that it intended the receipt to cover libelant's other claim also, under such circumstances, was nothing short of fraud.

Under this whole section of this brief the case of *Fire Insurance Association v. Wickham*, 141 U. S. 564, 35 L. Ed. 860, is squarely in point. In that case the plaintiffs had two claims against the various insurance companies under policies insuring the S. S. *"St. Paul"*. One claim was for damage caused by fire and the other for salvage of the vessel and cargo. The insurance companies admitted their liability for the damage caused by fire but denied all liability for the costs of salvage. They paid the claim for fire damage, the amount paid being exactly the same amount as that claimed in the proof of loss, and took receipts similar to the one given by plaintiffs to the Fire Insurance Association. It reads as follows:

> " '$1,344.42 January 19, 1884.
>
> Received from the Fire Insurance Association of London, England, thirteen hundred and forty-four 42/100 dollars, *it being in full of all claims and demands for loss or damage by fire* which occurred on the 10th and 24th days of November, 1883, *to property insured by*

policy No. 180,617, Buffalo, New York, agency, and in consideration of said payment said policy is hereby cancelled and surrendered to said company, *and all further claims by virtue of said policy forever waived.*

(Signed) John W. Wickham, Jr.,
Managing Owner.
W. B. Comstock,
per Wickham, Jr."

There was also a receipt endorsed upon the policy No. 180,617 as follows:

"January 19, 1884.

In consideration of four 47/100 dollars return premium, the receipt of which is hereby acknowledged, this policy is canceled and surrendered to the Fire Insurance Association (Limited) of England.

(Signed) John W. Wickham, Jr.
Managing Owner.
W. B. Comstock,
per Wickham, Jr.' "

The plaintiffs then brought suit for the salvage costs and the defendants contended that the claim had been compromised and offered their receipts in evidence in support of that contention. They further contended that as the claim was paid before it was due that was a good consideration for the settlement of all of the claims under the policies, but the court said that it was not unless so intended by both of the parties.

The court first noted that:

"The plaintiffs were never requested to compromise or release their claim for the expense of raising and saving the vessel, nor was the release or compromise of such claim spoken

of except by Wickham when he offered to settle, as hereinbefore stated, which offer was declined by the committee, as above stated, upon the ground that they had no authority to consider the matter."

It was held that:

"The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

"In this case there were two distinct and separate claims of similar amount, namely, $15,364.78, one of which was for the direct loss and damage to the property insured by the fire, and the other was for the incidental cost of raising the propeller and her cargo. The plaintiffs assumed, upon the face of the receipts, to settle with the defendant for both of these claims by the payment of the exact amount of one of them. In other words, they assumed to settle for a moiety of their entire claim—a claim the legality and justness of which was so far beyond dispute that it could hardly fail to be recognized by the agents of the insurance companies who were present at the meeting in New York. That they intended and supposed they were making a settlement of the plaintiffs' entire claim against them is probably true.

> But, aside from the parol testimony given by Wickham of the conversation at the meeting, the admissibility of which is the question in dispute, there was some evidence tending to show that the plaintiff Wickham may have supposed that he was settling only for the direct loss by the fire in the agreement for the survey or appraisement of the damages signed by both parties, which provided that it should not 'apply to or cover any question that may arise for saving boat and cargo'. There were also other circumstances tending to show that the agents of the companies might have known that Wickham supposed he was settling only for the direct loss."
>
> "The appraisement, the letter of Allen transmitting the proofs of loss, and the memorandum of the meeting of the underwriter's agents are all corroborative of the testimony of the plaintiffs that the committee replied to Wickham, when he asked them for a contribution for the expenses of raising and saving the vessel, that the companies were not liable for such expenses, and that they had no authority whatever for considering the claim for raising and saving the steamer. *If this be true, it requires no argument to show that the claim for salvage service was not intended to be included in the receipts.*"

In the case at bar there was no dispute as to the amount due on the smaller claim yet respondent seeks to establish a "compromise settlement" of both claims by paying the extra amount admitted to be due on the smaller claim. Neither is there any doubt that respondent knew that libelant was demanding payment on the larger claim and respondent was refusing payment on the ground that it was not liable.

The answer to the query of the lower court as to why the receipt for settlement in full of all claims should be given, when the larger claim was still pending, is that the respondent at first denied liability on the smaller claim (on paper belonging to the Crown Columbia Company) but was later convinced that it was liable on that claim, and respondent was then willing to pay it. The respondent never admitted any liability for the larger claim (the paper belonging to the Willamette Pulp & Paper Company) and still denies its liability for that claim. Mr. Sutro himself believed that libelant did not have a good cause of action on the larger claim and for that reason there were never any negotiations entered into between Mr. Sutro and respondent for the settlement of the larger claim. There was no occasion for Mr. Sutro's insisting that the larger claim be expressly excepted from the operation of the receipt because he did not know that such a claim was being made by libelant against the respondent. The respondent knew it, however, and if it intended that the receipt should cover the larger claim also, then respondent should have included it in the receipt as the receipt was drawn by the respondent.

CONCLUSION.

Under a contract called a policy of insurance libelant paid to the respondent a sum of money called a premium. In consideration of that premium respondent agreed to pay to libelant a certain

sum of money in the event that certain rolls of paper on board the Steamer *"Ruth"* were lost or damaged by the perils of the river while on a voyage from the port of Oregon City to the port of Portland.

During the life of the policy the Steamer *"Ruth"* while on that voyage with the rolls of paper on board stranded and sunk in the river and the paper was damaged. The respondent is therefore indebted to libelant for the value of the paper unless it can show good and sufficient reason why it should not pay its just obligations.

It is submitted that respondent has not shown good and sufficient reason, nor any reason at all, why it should be permitted to escape liability upon its contract honestly and fairly entered into by the libelant and upon which libelant paid its money in the utmost good faith. Under the law and the evidence as adduced at the trial, the decree of the District Court should be reversed and the cause remanded to ascertain the amount due to libelant under the policy of insurance.

Dated, San Francisco,
October 9, 1922.

Respectfully submitted,

Ira S. Lillick,
Proctor for Appellant.